



U.S. Department of Energy
Office of River Protection

P.O. Box 450
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0056411

JUN 21 2001

01-ORP-096

Mr. Michael A. Wilson, Program Manager
Nuclear Waste Program
State of Washington
Department of Ecology
1315 W. Fourth Avenue
Kennewick, Washington 99336

RECEIVED
JAN 23 2002

EDMC

Dear Mr. Wilson:

THE U.S. DEPARTMENT OF ENERGY SUBMITTAL OF STATEMENT OF DISPUTE FOR HANFORD FEDERAL FACILITY AGREEMENT AND CONSENT ORDER (TRI-PARTY AGREEMENT) CHANGE REQUEST M-62-01-02.

Per the Tri-Party Agreement, Article XVI Resolution of Dispute, we are forwarding our Statement of Dispute for Change Request M-62-01-02 (Attachment). At this time we are withdrawing our dispute with respect to M-45-00C, and the M-20 and M-90 milestones identified in Change Request M-90-01-01, because they are premature and not ripe for dispute.

If you have any questions, please contact me, (509) 376-2247.

Sincerely,

James E. Rasmussen
Environmental Policy Advisor
Office of River Protection

ORP:JER

Attachment

cc: See page 2

Mr. Michael A. Wilson
01-ORP-096

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cc: w/attach:

J. H. Richards, CTUIR

P. Sobotta, NPT

R. Jim, YN

E. Savage, BNI

M. J. Riess, CHG

R. F. Stanley, Ecology

D. R. Sherwood, EPA

J. S. Hertzell, FHI

O. S. Kramer, FHI

T. Martin, HAB

M. L. Blazek, Oregon Energy

C. E. Clark, RCA

J. B. Hebdon, RCA

Administrative Record

STATEMENT OF DISPUTE
HFFACO Change Request M-62-01-02

I. NATURE OF DISPUTE

This dispute involves Milestone M-62-06 of the Hanford Federal Facility Agreement and Consent Order (HFFACO, also known as the Tri-Party Agreement or TPA), START OF CONSTRUCTION – PHASE I TREATMENT COMPLEX, and the following facts:

On May 2, 2001, the U.S. Department of Energy, Office of River Protection (hereinafter DOE or ORP), submitted Change Request M-62-01-02 under the provisions of Section 12.0, Action Plan, Attachment 2, of the HFFACO. On May 16, the Washington State Department of Ecology (hereinafter Ecology) disapproved this change request:

I hereby disapprove these DOE requests¹ pursuant to HFFACO Action Plan section 12.3.2. This disapproval is based on the fact that DOE has not shown good cause for modification exists and has not met the requirements of HFFACO Action Plan section 12.3.2, (Request for Extension).

The principal justifications that change request M-62-01-02 describe are the supposedly “unavoidable time delays necessary to award a new Waste Treatment Plant contract” after receiving an “unacceptable price estimate from the Privatization Contractor” and the need to make the HFFACO consistent with DOE contracts and the Office of River Protection (ORP) baseline schedule

These justifications are insufficient for at least two reasons. First, when the existing HFFACO tank waste schedules were developed, the parties contemplated the possibility that DOE’s privatization approach would fail, but concluded that an “alternate path” schedule was unnecessary to keep the project on track. Second, DOE’s proposals are evidently based upon the incorrect assumption that changes made unilaterally by DOE to contract terms and baselines justify modifying the HFFACO. DOE is required to manage its contract terms and baselines to ensure compliance with the schedule contained in the HFFACO not vice versa.²

.....

1. As used here, Ecology is using “these” to refer not only to Change Request M-62-01-02 but also Change Requests M-90-01-01 and M-45-01-01. As stated, this Notice of Dispute addresses only Change Request M-62-01-02.

2. May 16, 2001 Letter, M. Wilson, Ecology, to J. Rasmussen, DOE, RE: Disapproval of U.S. Department of Energy (DOE) Hanford Federal Facility Agreement and Consent Order (HFFACO) Change Requests M-45-01-01, M-62-01-02, and M-90-01-01, all dated May 2, 2001, p. 2 (emphasis added).

The change requests also include several important technical deficiencies. These include but are not limited to the following: DOE has not described the length of each extension requested (e.g., interim milestone M-62-06), has not described good cause for each proposed extension Further, although DOE has listed several purported "good cause" bases for modification, it has not explained its rationale as to why the proposed modifications satisfy the good cause criteria, nor has DOE specified which criteria apply to which milestone.³

In response, ORP submitted a request for reconsideration dated May 21, 2001 that, among other things, supplied DOE's rationale that good cause exists to extend milestone M-62-06.⁴ That milestone provides as follows:

START OF CONSTRUCTION – PHASE I TREATMENT COMPLEX.

FIRST PLACEMENT OF STRUCTURAL CONCRETE AT ONE OF THE TREATMENT COMPLEX PRINCIPLE (sic) FACILITIES (I.E., (sic) PRETREATMENT, LOW-ACTIVITY WASTE VITRIFICATION, OR HIGH-LEVEL WASTE VITRIFICATION FACILITIES).

ORP's basis and rationale for requesting this extension has been clear and consistent from the outset of discussions concerning this milestone. For example, on February 26, 2001, ORP submitted a draft change request package intended to initiate negotiations with Ecology on this issue. That letter stated:

As you know [DOE] recently awarded a new contract . . . for the design, construction, and commissioning of [the WTP] for treatment and immobilization of high-level wastes. This contract was awarded on December 11, 2000, to replace the privatization contract with BNFL, Inc. (BNFL). Despite DOE's exercise of due diligence, that contract was terminated under federal procurement and acquisition regulations when, among other things, BNFL's cost estimate suddenly and inexplicably escalated to \$15.5 (sic) billion,

3. *Id.* p. 3. (text relating to M-90-01-01 and footnote omitted).

4. Although DOE's May 2 submittal did not formally state the rationale for determining that good cause exists to extend milestone M-62-06, that rationale permeates the correspondence between the Parties relative to this change request, starting with a draft request submitted by DOE on February 26, 2001. The existence of the facts giving rise to good cause justifying extension of this milestone have been common knowledge since the Secretary of Energy announced on May 8, 2000 that the Privatization Contract would be terminated and a new contract issued. On this basis, Ecology and DOE thereafter entered into a legally enforceable agreement requiring DOE to request proposals for a replacement contract and award it not later than January 15, 2001. The terms of that Request for Proposals (RFP) and the contract awarded – both of which were reviewed and understood by Ecology – clearly delay START OF CONSTRUCTION until a date To Be Determined (TBD) after the new contractor has an opportunity to become fully engaged in the process and propose a new project baseline and schedules.

far in excess of the government fair cost estimate of \$6.6 billion and available congressional funding approvals.

As a result of the termination of the BNFL contract and failure of privatization, DOE exercised an alternative contracting pathway as identified in the report required under Milestone M-62-02. Despite DOE's diligence in awarding the new WTP contract on an extremely tight schedule, it has become clear that certain milestone dates in the [HFFACO] will not be met as currently scheduled. For example, termination of that contract caused delay in Milestone M-62-06, Start of Construction Phase I Treatment Complex by July 31, 2001.⁵

That rationale was re-stated in ORP's May 2, 2001 formal submission of a signed change request for this milestone:

The Tri-Party Agreement Milestone M-62-06 (start Phase I construction by July 31, 2001) is no longer technically achievable as the result of an unacceptable price estimate from the Privatization Contractor (\$15.2 B vs. \$6.6 B government cost estimate) and unavoidable time delays necessary to award a new Waste Treatment and Immobilization Plant (WTP) contract under competitive Federal procurement rules. These actions constitute good (sic) [cause] for the requested Tri-Party Agreement extension under the cited Force Majeure provisions of the Tri-Party Agreement.⁶

To eliminate any formal deficiency in the M-62-06 change request record, ORP's May 21, 2001 request for reconsideration and amended change request⁷ included the following:

Good Cause for the Extension Sought: These events constitute good cause for extension under: Article XLVII, paragraph 145.G, Insufficiency of appropriated funds – because of the unacceptably high and unfunded cost of the privatization proposal that caused DOE to terminate that contract; Article XLVII, Force Majeure, paragraph 145F, delays caused by compliance with applicable statutes or regulations governing contracting, procurement or

5. February 26, 2001 Letter, H. Boston, K. Klein, DOE, to T. Fitzsimmons, Ecology, C. Findley, US EPA, Change Request Package, p. 1., 01-ORP-044 (footnote omitted).

6. May 2, 2001 Letter, J. Rasmussen, DOE, to M. Wilson, Ecology, Submittal of a Signed Change Request (CR) M-62-01-02, Revising Milestone Completion Dates for Four Interim Milestones (M-62-06, M-62-07, M-62-10, and M-62-11) In Support of the Pretreatment Processing and Vitrification of Hanford High-Level Waste (HLW) and Low-Activity Waste (LAW), 01-ORP-063.

7. May 21, 2001 Letter, H. Boston, DOE, to M. Wilson, Ecology, U.S. Department of Energy (DOE) Draft Hanford Federal Facility Agreement and Consent Order (Tri-Party Agreement) Change Request (CR) M-62-01-02: Response/Clarification to State of Washington Department of Ecology's (Ecology) Concerns Regarding the "Draft" Change Request, 01-ORP-074.

acquisition procedures, despite the exercise of reasonable diligence – this resulted from the need to issue and award a new contract to design, build, and commission the WTP, consuming time that would have otherwise been used to prepare for start of construction; and, in the alternative, Article XL, paragraph E, any other series of events mutually agreed to by the Parties as constituting good cause.

That amended change request also addressed Ecology's concern regarding the duration of the extension:

Length of Extension Sought: DOE is unable to state the length of the extension needed because (1) this date was predicated on the BNFL privatization contract proceeding as planned; (2) since that contract was terminated, the Federal procurement process required to award a new contract consumed eight months that would otherwise have been used in preparing for start of construction; (3) after award of the new contract, the new contractor needs adequate time to develop its proposed performance schedule for DOE review and possible negotiation. BNI submitted its proposed schedule on April 15, 2001 and it is now under review.

Ecology's May 23, 2001 disapproval of ORP's request for reconsideration⁸ stated as follows:

We have consequently reviewed your submittal of May 21, and have carefully considered your request. We note that while DOE has added additional explanatory language and associated information to its May 2, 2001 requests for change, the proposed modifications to the HFFACO itself are identical to those proposed within Change Requests . . . M-62-01-02 . . . which Ecology has already disapproved. We see no reason to create a second line of dispute in this matter. While we will certainly take DOE's additional explanatory language and information into consideration whether or not DOE invokes dispute resolution provisions; (sic) we decline to reconsider our May 16 disapproval or to extend the HFFACO deadline for initiating dispute resolution. Be advised that Ecology's May 16, 2001 disapproval of DOE's request stands.

Consequently, ORP filed a Notice of Dispute on May 23, 2001.⁹

8. May 23, 2001 Letter, M. Wilson, Ecology, to H. Boston, DOE, RE: Disapproval of U.S. Department of Energy (DOE) Hanford Federal Facility Agreement and Consent Order (HFFACO) Change Requests M-45-01-02, M-62-01-02, and M-90-01-01, all dated May 2, 2001. ORP also requested Ecology to extend or toll the limitations period in the TPA for filing Notice of Dispute in the hope that the Parties could use this extended period of time to pursue a mutually agreeable resolution of this issue, rather than forcing the matter into the dispute/appeal process before all relevant facts are known and understood.

9. May 23, 2001 Letter, H. Boston, DOE, to M. Wilson, Ecology, Initiation of Dispute Resolution for Change Requests (CR) M-45-01-01, M-62-01-02, M-90-01-01, 01-ORP-075.

II. DOE'S POSITION ON THE DISPUTE

Under the terms and conditions of the HFFACO and the facts discussed herein, DOE believes that good cause exists to extend milestone M-62-06 as requested in Change Request M-62-01-02. Good cause for Change Request M-62-01-02 exists under HFFACO Article XLVII, Paragraph 145.G, insufficiency of appropriated funds – because of the unacceptably high and unfunded cost of the privatization proposal submitted by BNFL in April 2000 that caused DOE to terminate the contract; Article XLVII, Force Majeure, paragraph 145.F, delays caused by compliance with applicable statutes or regulations governing contracting, procurement or acquisition procedures, despite the exercise of due diligence - this resulted from the need to issue and award a new contract to design, build and commission the waste treatment plant (WTP), consuming time that otherwise would have been used to prepare for start of construction of the WTP; and, in the alternative, Article XL, paragraph E, any other series of events mutually agreed to by the Parties as constituting good cause - this mutual agreement between DOE and Ecology is the September 19, 2000 approved amendment to Consent Decree No. CT-99-5076-EFS, in which DOE was required to award a contract to replace the terminated privatization contract for the design, construction, and commissioning of a Phase I WTP by January 15, 2001.

III. SUPPORTING INFORMATION

HFFACO Change Request M-62-01-02, dated May 2, 2001, requested revision of four interim milestones: M-62-06, M-62-07, M-62-10, and M-62-11. These interim Milestones were negotiated between Ecology and DOE based on the BNFL Privatization Contract and were subsequently incorporated into the HFFACO in the March 29, 2000 Director's Determination (commonly referred to as the Tank Waste Final Determination). A separate Milestone, M-62-05, required DOE to authorize Part B-2, Phase I of the Waste Treatment Plant (WTP) Privatization Contract with BNFL, DE-AC06-96RL13308 (to design, construct, and commission the WTP) by August 31, 2000.

Assuming that DOE's Authorization to Proceed (ATP) with Part B-2 would occur by August 31, 2000, milestone M-62-06 established July 31, 2001 for start of construction of Phase I facilities. That date, however, was subject to a 6-month re-negotiation window provided in M-62-05 to:

revise or confirm start of construction and construction milestone due dates (see milestones M-62-06 and M-62-07) within six (6) months of Authorization to Proceed.¹⁰

Furthermore, Authorization to Proceed with Part B-2 was contingent on the technical feasibility of the design submission by BNFL, and the viability of the BNFL Privatization Funding Plan which DOE had estimated at \$6.6 B. However, when the BNFL B-1 deliverables were submitted to DOE in April 2000, the BNFL's Privatization Funding Plan costs had escalated to \$15.2 B, more than double the government's cost estimate. In May 2000, DOE determined that BNFL's

10. Tank Waste Final Determination, March 29, 2000, Milestone M-62-05, p. 25.

Privatization Funding Plan was unreasonable and not in the best interest of the government, and directed that the BNFL Privatization contract be terminated.¹¹ The Secretary concurrently directed ORP to expeditiously re-compete the design and construction of the WTP under federal procurement procedures.

Thereafter, DOE and Ecology negotiated an amendment to existing Consent Decree No. CT-99-5076-EFS (filed November 30, 2000) in lieu of litigation over the missed August 31, 2000 M-62-05 interim ATP milestone. DOE was required to award a contract to replace the terminated privatization contract for the design, construction, and commissioning of a Phase I WTP by January 15, 2001. This new contract was subsequently awarded on December 11, 2000, Contract No. DE-AC27-01-01RV14136.

As noted above, the M-62-05 interim milestone required the parties to revise or confirm start of construction and construction progress milestone due dates within 6 months of the Authorization to Proceed.¹² This milestone provision was negotiated between the parties at the time the start of construction was established to reflect the substantial technical and regulatory uncertainties associated with the immaturity of the WTP design. Although DOE made a substantial and good faith effort to retain as much of the BNFL design as possible in re-competing the design and construction of the WTP, nothing during the intervening period changed the existing technical and regulatory uncertainties associated with start of construction. Indeed, DOE's subsequent technical review of the BNFL's 30% technical design and regulatory permitting contract submittals of April 2000 indicated numerous areas of unacceptable design and regulatory licensing maturity that most likely would have impacted start of construction, even if the B-2 Privatization Decision been approved and Authorization to Proceed granted.

During negotiations of the Consent Decree amendment, it was apparent to and understood by both DOE and Ecology that award of a new WTP contract by the date specified in that decree meant that the M-62-06 milestone could not possibly be met. In short, as a result of the Consent Decree amendment, the "Authorization to Proceed" date for this project changed from August 31, 2000 to the new contract award date of January 15, 2001. If the language in milestone M-62-05 had expressly survived issuance of this Consent Decree and deletion of M-62-05 from the TPA, the Parties would have been engaged in negotiations during the period between January and July 15, 2001 for these start of construction milestones. ORP attempted to informally initiate these negotiations on February 26, 2001, followed up with a formal change request on May 2 and the request for reconsideration submitted May 21, 2001 – all within the 6-month window provided by former M-62-05.

11. DOE Headquarters Press Release, Richardson to Terminate BNFL Hanford Contract; Design Work to Continue During New Competition, May 8, 2000.

12. As noted above, these are milestones M-62-06, Start of Construction – Phase I Treatment Complex and M-62-07, Construction Progress Milestones (2) – Phase I Treatment Complex.

In submitting the May 2, 2001 HFFACO Change Request, DOE stated that the change request was required because: (1) The HFFACO milestone M-62-06 (start of construction by July 31, 2001) was no longer technically achievable as the result of an unacceptable price estimate from the Privatization Contractor (\$15.2 B v. \$6.6 B government cost estimate); and, (2) unavoidable time delays had resulted from the necessary to award a new WTP contract under competitive Federal contract rules. DOE additionally noted that the changes were necessary to integrate the programmatic schedules negotiated in awarding the new WTP Contract, No. DE-AC27-01-01RV14136. In support of the justification for modification of M-62-06, M-62-07, M-62-10, and M-62-11 interim milestones, DOE cited as authority HFFACO Article XL, Good Cause for Extensions, paragraphs 119, 120.A, 120.D, and 120; HFFACO Article XLVII, Force Majeure, paragraphs 145, 145.F, and 145; and Section 12.0 of the Action Plan.

On May 16, 2001, Ecology disapproved DOE's change request for modification of the M-62-06, M-62-07, M-62-10, and M-62-11 interim milestones. Ecology acknowledged that "when the existing HFFACO tank waste schedules were negotiated, the parties contemplated the possibility that DOE's privatization approach would fail". However, Ecology then erroneously stated "that an 'alternative path' schedule was unnecessary to keep the project on track". Ecology's conclusion is not consistent with the specific language contained in M-62-05 as incorporated into the HFFACO by the March 29, 2000 Director's Determination, with the parties mutual agreement to extend award of the contract for WTP design and construction in the amendment to Consent Decree No. CT-99-5076-EFS, or with Milestone M-62-02.

HFFACO Milestone M-62-02 required DOE to submit a report to "identify and describe credible alternatives to the current privatization approach". The First Amendment to Consent Decree No. CT-99-5076-EFS expressly authorized an alternative pathway to privatization by authorizing a competitive federal procurement. M-62-05 expressly contemplated and made provisions for revision of both start of WTP construction and interim construction milestones: "*The parties will revise or confirm start of construction and construction progress milestone due dates (see Milestones M-62-06 and M-62-07) within 6 months of Authorization to Proceed. Revision, if necessary, shall be consistent with hot commissioning by December 2007, commercial operations by December 2009, and completion of Phase I treatment by February 2018.*"

The second reason Ecology provided for denying this change request is that DOE had unilaterally changed its contract and baseline without prior approval. Here again, Ecology and DOE agreed to fundamentally change the method and timing of the DOE contract to design and construct the WTP in their mutually agreed upon, approved amendment to Consent Decree No. CT-99-5076-EFS, in which DOE was required to competitively award a contract to replace the terminated privatization contract for the design, construction, and commissioning of a Phase I WTP by January 15, 2001.

Based on Ecology's May 16, 2001 allegation that DOE had failed to provide sufficient good cause justification to support the M-62-01-02 milestone change request, DOE submitted a request for reconsideration and an amended change request dated May 21, 2001 to further clarify

DOE's bases for seeking changes to the affected milestones. On May 23, 2001, Ecology again rejected DOE's change request. In both the May 16 and May 23, 2000 rejections, Ecology raised a litany of perceived wrongs it alleges that DOE committed in the past, but failed to address directly the specific good cause issues raised by DOE in the Change Request pursuant to HFFACO Article XL, Good Cause for Extensions, paragraphs 119, 120.A, 120.D, and 120. Those specific good cause issues include, but are not limited to, the following:

- Did the Secretary of Energy have good cause to cancel the Privatization Contract when the cost inexplicably increased from \$6.6B to \$15.2B;
- Did the DOE violate any obligation under the HFFACO by canceling the Privatization Contract, or by adhering to federal procurement law in competing a new contract for design and construction of the WTP; and,
- Did Ecology and DOE's mutual agreement to amend Consent Decree No. CT-99-5076-EFS, requiring DOE to award a contract to replace the terminated privatization contract for the design, construction, and commissioning of a Phase I WTP by January 15, 2001 constitute good cause for modification of the start of construction milestone, M-62-06?

Further, although not raised directly by DOE in its justification for HFFACO Change Request M-62-01-02, DOE notes that Ecology, other state regulators, and the U.S. Environmental Protection Agency have not yet issued the necessary environmental permits (or waived such requirement) for start of construction under the existing HFFACO M-62-06 milestone by July 31, 2001. For example, the Washington Department of Health, a non-signatory to the HFFACO, has not issued a radioactive air emissions license necessary to initiate start of construction of the WTP under WAC 246-247-060. Similarly, Ecology has not issued a notice of construction approval under RCW 70.94.152, nor has a pre-construction permit under Title I of the Federal Clean Air Act been issued, see WAC 173-401-705. Each of these permitting requirements are regulatory prerequisites to commencement of construction activities.

IV. HISTORY OF ATTEMPTED RESOLUTION

In response to DOE's submittal of draft HFFACO Change Request M-62-01-02, dated February 26, 2001, Ecology requested clarifications by letter dated March 1, 2001. DOE replied in part in its March 2, 2001 signed Change Request M-62-01-02. DOE subsequently provided a detailed response to Ecology in its May 21, 2001 request for reconsideration. On May 23, 2001 Ecology rejected DOE's request for reconsideration, but agreed to consider the additional information submitted by DOE in support of HFFACO Change Request M-62-01-02 during dispute resolution. On May 23, 2001, DOE initiated Dispute Resolution pursuant to HFFACO Article VIII, Resolution of Disputes, paragraph 30. Subsequent to initiation of the dispute resolution process, DOE has made a reasonable and good faith effort to informally resolve this dispute with Ecology. However, the DOE and Ecology have been unable to come to a mutual agreement in settlement of this dispute on an informal basis.